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c 23 English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986

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CHAPTER 23

**An Act to implement the Terms of a Settlement
of all Claims arising out of the Contamination by
Mercury and other Pollutants of the
English and Wabigoon and Related River Systems**

Assented to July 7th, 1986

WHEREAS the Government of Canada, the Government of Ontario, Reed Inc., Great Lakes Forest Products Ltd., The Islington Indian Band and The Grassy Narrows Indian Band have entered into a settlement of all claims and causes of action, past, present and future, arising out of the discharge by Reed Inc. and its predecessors of mercury and other pollutants into the English and Wabigoon and related river systems and the continuing presence of any such pollutants, including the continuing but now diminishing presence of methylmercury, in the related ecosystems since its initial identification in 1969; Preamble

AND WHEREAS the discharge of such pollutants and governmental actions taken in consequence thereof may have had and may continue to have effects in respect of the social and economic circumstances and the health of the present and future members of the Bands;

AND WHEREAS the Government of Canada and the Government of Ontario have assumed certain obligations under the settlement in favour of the Bands;

AND WHEREAS the settlement provides, among other things, for the payment of certain sums to each Band, for the establishment of The Grassy Narrows and Islington Bands Mercury Disability Board, the establishment of the Grassy Narrows and Islington Bands Mercury Disability Fund, the payment of benefits to Band members and, subject to certain exceptions contained in the settlement, the abolition of all existing and future rights of action of the Bands and of every past, present or future member of the Bands, and the estates thereof, in respect of any claims and causes of action that are the subject of the settlement, in consideration of the rights and benefits set out in the settlement;

AND WHEREAS it is expedient that the Legislature give effect to and implement the terms of the settlement;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions

1. In this Act,

“administrator” means a person authorized under this Act to administer the Fund in accordance with a plan document;

“applicant” means any member or past member of a Band who makes an application or on whose behalf an application is made and lodged with the administrator, and shall be deemed to include, as if a member of a Band, a registered Indian customarily resident on a reserve before the 1st day of October, 1985;

“application” means a written application, in prescribed form, of an applicant and includes a medical report in prescribed form from an authorized physician;

“authorized physician” means a physician entitled to practice medicine in any jurisdiction in Canada or the United States of America and designated as an authorized physician by the Board;

“award” means a decision of the Board to make available a benefit to an applicant in respect of an application and includes a determination by the administrator which has not been reviewed by the Board;

“Band” means The Islington Band of Indians or The Grassy Narrows Band of Indians and “the Bands” means both of them and includes, for the purposes of sections 36 and 39, a registered Indian customarily resident on a reserve before the 1st day of October, 1985;

“Band Council” means the Council of a Band;

“benefit” means the monetary amounts paid or payable by the administrator pursuant to an award and “maximum benefit” means the maximum monetary amounts payable in accordance with the terms of the settlement;

“Board” means The Grassy Narrows and Islington Bands Mercury Disability Board established by this Act;

“certificate” means a resolution of the Council of the Band of which an applicant is a member, setting forth such matters as the Board may prescribe;

“condition” means an observable medical symptom, sign or condition, or combination of related medical symptoms, signs or conditions which,

- (a) is a known condition, or
- (b) has been determined by the Board to constitute a condition, on the basis that it is reasonably consistent with mercury poisoning and capable of significantly impairing the quality of life or limiting the activities of an applicant, and “known condition” means any of the conditions specified as known conditions in the settlement;

“costs of the Board” means,

- (a) fees and disbursements payable to or incurred by or on behalf of the members of the Board in connection with their duties as members,
- (b) the personal expenses of an applicant awarded by the Board under section 29, and
- (c) the expenses incurred by the Board in consulting with professionally qualified persons under clause 6 (1) (b),

but does not include the fees and disbursements of a member who is a Band representative or of a member who is an employee of any other party to the settlement;

“depletion” means the total amount of reserves maintained by the administrator;

“disability” means a condition or combination of conditions observed by an authorized physician upon examination of an applicant;

“disbursements” means the costs of travel, accommodation, meals and communications reasonably incurred by or on behalf of members of the Board in connection with their duties as members;

“fiscal year” means the period from the 1st day of April in one year to the 31st day of March in the next year;

“Fund” means the Grassy Narrows and Islington Bands Mercury Disability Fund established by this Act;

“plan document” means the document or documents which define the responsibilities of the administrator and includes an agreement between the Board, or members of the Board, and the administrator, the schedules prescribing criteria for persons who may obtain assistance for disability and the levels of benefits, Neurological Grading Guidelines, Clinical Neurological Examination Protocol and the form of application prescribed by the Board;

“prescribed” means prescribed by the Board;

“reserve” means, as the context requires, the land set aside for the use and benefit of a Band or an amount designated by the administrator according to actuarial principles for the satisfaction of an award;

“settlement” means a settlement made in the public interest with the Bands, as set out in a Memorandum of Agreement signed by the parties thereto in the month of November, 1985, of disputes arising out of the discharge, by Reed Inc. and its predecessors, of mercury and any other pollutants into the English and Wabigoon and related river systems, and the effects which the discharge of such mercury and other pollutants and the continuing but now diminished presence of methylmercury in the related ecosystems may have had and may continue to have upon, and the concerns raised in respect of, the social and economic circumstances and the health of the present and future members of the Bands;

“undepleted balance” means the actual balance of the Fund including accrued income, less depletion.

Purpose
of Act

2. The purpose of this Act is to implement, to the extent that the legislative authority of the Legislature extends thereto, the terms of a settlement, subject to certain exceptions contained therein, of all claims, whether past, present or future, arising out of the contamination by mercury and other pollutants of the English and Wabigoon and related river systems, the terms of which settlement are embodied in a Memorandum of Agreement signed by the parties thereto in the month of November, 1985, made between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Her Majesty the Queen in Right of the Province of Ontario, Reed Inc., Great Lakes Forest Products Ltd., The Islington Indian Band and The Grassy Narrows Indian Band.

3.—(1) A board to be known as “The Grassy Narrows and Islington Bands Mercury Disability Board” is hereby established. Board established

(2) The Board shall consist of seven members, composed of a chairman and, Composition of Board

- (a) two members, one of whom is a representative of one Band and one of whom is a representative of the other Band;
- (b) two members, each of whom is a duly qualified physician; and
- (c) two members who are not representatives or members of either Band or duly qualified physicians.

4.—(1) The chairman and other members of the Board shall be appointed by a search committee, constituted in accordance with the terms of the settlement, on such terms and conditions as the search committee agrees upon with each Board member. Appointment of Board members

(2) The chairman and other members of the Board may be replaced from time to time by the search committee, and every appointment or replacement must be the unanimous decision of the search committee and shall be certified in writing by each member of the committee. Appointments or replacements to be unanimous

(3) Pursuant to the settlement, Canada, Ontario, The Islington Indian Band and The Grassy Narrows Indian Band shall each pay 25 per cent of the costs of the Board. Costs of the Board

(4) Disbursements of the Board or of members of the Board, as the case may be, shall generally be in accordance with the levels from time to time in effect in respect of employees of Ontario. Level of disbursements

(5) The administrator shall, in accordance with the procedures prescribed by the regulations made under this Act, Collection of costs of Board by administrator

- (a) collect the costs of the Board from time to time from the parties liable therefor; and
- (b) pay the moneys when received to the persons entitled thereto.

(6) Neither the Board nor any member thereof is liable for any act done or decision made in good faith in relation to any aspect of its proceedings. Liability of Board

Panel for
decision
of Board

5. The chairman, the two Band representatives and two other members, designated for the purpose by the chairman, constitute a panel of the Board and are sufficient for the exercise of all the jurisdiction and powers of the Board in connection with the making of a decision by the Board.

Powers of
Board

6.—(1) The Board may,

- (a) consult with and obtain the assistance of any official of the Government of Canada or of Ontario who is able to provide information, advice or assistance to the Board in respect of public health, public health education or any government programs that the Board considers may touch upon the matter of mercury poisoning;
- (b) consult with such professionally qualified persons as the Board considers necessary;
- (c) make such recommendations as the Board considers appropriate to the Bands or to any minister of the Government of Canada or Ontario;
- (d) amend the plan document in accordance with subsection 22 (1);
- (e) amend, or with the consent of the Attorney General of Ontario, terminate an agreement with an administrator and enter into an agreement with another administrator;
- (f) have regard to the terms of the settlement for the purpose of interpreting and giving effect to this Act,

and shall,

- (g) supervise the administration of the Fund and make awards or supervise the making of awards by the administrator in accordance with this Act; and
- (h) designate from time to time as authorized physicians two or more physicians that the Board considers,
 - (i) have expert knowledge in respect of conditions consistent with methylmercury poisoning, and

- (ii) will be available and may be required for the purpose of providing medical reports in respect of applicants.

(2) The Board may,

Idem

- (a) prescribe the form of an application;
- (b) prescribe the contents of an affidavit that is to accompany an application;
- (c) prescribe the matters that are to be included in a certificate;
- (d) prescribe the form of medical report to be submitted with an application;
- (e) prescribe any other matter or thing that by this Act is to be or may be prescribed.

(3) The Board may, in its discretion, make an award that takes effect on a day not earlier than the day the application relating to the award was made.

Retroactive
application
of award

7. Where the Board considers that, after the date of the settlement,

Where
conduct
of applicant
to be
considered
by Board

- (a) the conduct of an applicant has contributed and is contributing to the continuation or exacerbation of a disability;
- (b) the applicant at the time of the conduct had an understanding of its possible effects; and
- (c) the conduct occurred under circumstances where the applicant knew or ought to have known that a practical alternative form of conduct without significant disadvantage was available,

the Board,

- (d) shall consider the conduct in making or reviewing an award and may establish or vary conditions in the award; and
- (e) may, where there are clear clinical grounds for concluding that the conduct has contributed to the continuation or exacerbation of the disability or where the Board finds that any condition attached to an award under clause (d) has been disregarded, make

or vary an award to provide a benefit in such lesser amount than would otherwise be provided as the Board considers appropriate.

Fund to be established

8.—(1) There shall be established and maintained a fund to be known as the Grassy Narrows and Islington Bands Mercury Disability Fund into which shall be deposited by each Band the sum of money set out in the settlement.

Agreement between Board and administrator

(2) The Board shall make use of the services of an administrator in the investment, management and administration of the Fund and shall, subject to the approval of the Attorney General of Ontario, enter into such agreement or agreements with any person as the Board considers necessary for that purpose.

Gifts or bequests

(3) The administrator may,

- (a) accept and administer as part of the Fund any unconditional gift or bequest from any person; and
- (b) with the approval of the Board, accept and administer in accordance with the conditions attached thereto, any conditional gift or bequest from any person.

When Board not to approve acceptance of gift or bequest

(4) The Board shall not approve the acceptance of any conditional gift or bequest if the Board considers that the conditions attached thereto are not consistent with the objects of this Act or the administration of the Fund.

Income forms part of Fund

(5) The income of the Fund shall form part of the Fund.

Benefits paid out of Fund

(6) Every benefit paid by the administrator under the authority of this Act shall be paid out of the Fund.

Fees and expenses of administrator

(7) The fees and approved expenses of the administrator as provided for in the plan document shall be paid out of the Fund.

Reserves

(8) The administrator shall, in respect of each award, set aside and maintain a reserve, determined and revised from time to time in accordance with actuarial principles, in the amount estimated to be required, together with the income thereon, to provide for the payment of benefits under the award.

When undepleted balance is less than \$100,000

(9) In the event that the undepleted balance is less than \$100,000 at any time, the administrator shall thereupon give notice thereof in writing to the Bands, the Treasurer of

Ontario and the Board and thereupon the Treasurer shall from time to time as required deposit to the Fund out of the Consolidated Revenue Fund such amount of money as is required to raise the undepleted balance to not less than \$100,000.

(10) The administrator shall provide for an audit of the Fund annually and at the end of each fiscal year shall provide a copy of the auditor's report to the Bands, the Attorney General of Ontario, the Treasurer of Ontario and the Board.

Audit of Fund

9. An applicant may, at any time before the Fund is closed, submit an application in the prescribed form for assistance from the Fund in respect of disability which the applicant believes is caused by mercury poisoning.

Application for assistance

10. An application shall be accompanied by,

Material to accompany application

- (a) an affidavit of the applicant setting out the matters prescribed;
- (b) in respect of the conditions manifested in the disability, a medical report from an authorized physician;
- (c) a certificate of the Council of the Band of which the applicant is a member setting out such matters as the Board prescribes; and
- (d) such other material as the Board prescribes.

11. Every application shall be submitted to the administrator and, in the event that an application is submitted by an applicant to the Board or to a member of the Board, the Board or the member shall forthwith transmit the application to the administrator.

Submission of application to administrator

12. The administrator shall determine whether each application is in the prescribed form and, if it is not, shall provide written notice to the applicant setting out the deficiencies.

Application to be in prescribed form

13. Any deficiencies may be corrected without resubmission of the entire application.

Corrections

14. Upon receipt of an application in the prescribed form, the administrator shall, within twenty-one days,

Duties of administrator on receipt of application

- (a) if the application qualifies in accordance with the plan document and is accompanied by the material set out in section 10, subject to clause (c), advise

the applicant and the Board in writing that the application is accepted and specify the benefit payable in accordance with the plan document;

- (b) if the application does not appear to the administrator to qualify in accordance with the plan document or is not accompanied by the material set out in section 10, advise the applicant and the Board in writing of the reason it does not appear to qualify; or
- (c) if unable to determine whether the application qualifies, or what is the benefit payable, in accordance with the plan document, or if the administrator believes that there is any reason for the application to be considered by the Board, transmit the application to the Board together with such questions for the Board's decision as the administrator considers appropriate, and advise the applicant in writing that the application has been transmitted to the Board.

Provision
of interim
benefits to
applicant

15. When an application is transmitted to the Board under clause 14 (c), the administrator may, with the consent of the chairman, provide such benefit to the applicant as the administrator considers appropriate pending a decision from the Board and, in the event that the Board subsequently decides that an award should not be made or that a lower benefit should be provided, the amounts or the excess amounts which have been provided shall not be recovered from the applicant.

Where Board
required to
review
decision

16. An applicant or the Board or any member of the Board may, at any time after a determination by the administrator under clause 14 (a) or (b), by notice in writing to the Board or to the applicant or to the Board and the applicant respectively, require that the decision of the administrator be reviewed.

Powers of
Board

17. The Board shall, at its next meeting, or in any event within four months or, if more than two years after the coming into force of this Act, eight months after receipt of an application under clause 14 (c) or of notice under section 16, review the application and,

- (a) approve the application and make or confirm or vary an award; or
- (b) reject the application.

Provision
of benefits

18. When an application is subject to review under section 16, the administrator shall, pending receipt of the Board's decision, provide a benefit, or not, in accordance with the

determination made under section 14 and, if the determination is varied by the award of the Board, the administrator shall not give retroactive effect to the award unless expressly so directed by the Board's decision.

19. The chairman shall set forth and certify in writing every decision of the Board and shall incorporate in the decision the answer of the Board to any question submitted by the administrator under clause 14 (c), and shall provide a copy of the decision to the applicant and to the administrator.

Chairman to
certify
decision
of Board

20. The Board may in its sole discretion, at any time after giving notice to the applicant, on its own motion or upon request from an applicant or any member of the Board or the Attorney General of Ontario, review and vary any award.

Review by
Board

21.—(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact and law that arise in any matter before it and, subject to sections 20 and 23, every decision of the Board is final and binding and is not subject to review and, subject to this Act, shall be given effect by the administrator.

Decision
final

(2) The *Statutory Powers Procedure Act* does not apply to the Board in its exercise of a statutory power of decision under this Act.

Non-
application
of
R.S.O. 1980,
c. 484

22.—(1) The Board shall not amend the plan document, except as provided for in subsection (2), without the consent of the Attorney General of Ontario, the Minister of Indian and Northern Affairs, Canada and the Band Councils.

Consent
required to
amend plan
document

(2) The Board may add any further condition to the plan document and assign points in respect of such condition in conformity with the distribution of points then in effect for other conditions.

Addition of
further
conditions
to plan
document

(3) Notwithstanding anything in this Act, the Board shall make or confirm or vary each award in such amount as it considers appropriate, having regard to the nature and extent of an applicant's disability, but shall not make any award in an amount greater than the maximum benefit.

Award to be
based on
nature and
extent of
disability

23. The Board shall establish its own procedure including, without limitation, the location of its meetings, and any applicant aggrieved by the procedure, even where the procedure prescribed by this Act has been followed, may request the Board to review an award under section 20.

Procedure

Evidence

24.—(1) The Board may make any decision without hearing any evidence but may, in its sole discretion, hear evidence under oath and every member of the Board may examine or cross-examine any person.

Applicant
may be
heard

(2) Any applicant may appear and be heard at any meeting of the Board at which his or her application or award is to be considered or reviewed, and the Board shall provide notice to each applicant accordingly.

Examination
of persons

25. No person other than a member of the Board may, except to the extent permitted by the Board in its sole discretion, examine or cross-examine any person at any meeting of the Board.

Report to be
considered

26. The Board shall consider, in respect of each condition manifested in the disability, the medical report of an authorized physician before making an award.

What Board
may consider

27. The Board shall consider any information, advice, report, evidence or other material or matter which, in its sole discretion, it deems useful for the purpose of deciding any matter including whether it may be appropriate to make or vary any award or awards, and may hear or, subject to subsection 24 (2), not hear any person.

No costs

28. The Board shall not award costs of any application.

Personal
expenses

29. The Board may, in its sole discretion, direct payment of all or part of the personal expenses of an applicant in connection with an application, whether or not the Board makes an award.

Quorum

30.—(1) The quorum of the Board shall be four of the panel established under section 5 and the decision of three or more members of the panel is the decision of the Board, and where a decision is not concurred in by three or more members of the Board,

(a) in the case of a review brought under section 16, the decision of the administrator shall be deemed to be confirmed; and

(b) in the case of an application transmitted under clause 14 (c), the application shall be deemed to be rejected.

Use of
telecommuni-
cations

(2) The Board may, with the consent of the members of the panel established under section 5 and, where applicable, of an applicant, conduct any meeting or make any decision by tele-

communications without the members being physically present in the same place.

(3) Other than for the purposes of section 32 and subject to subsection (4) of this section, not more than five members shall participate in any decision of the Board.

Five
members
only to
participate
in decision

(4) Notwithstanding section 5, the chairman may, if the nature of any decision appears to justify the consequent cost, establish a panel of all members of the Board, in which event the quorum shall be six and the decision of four or more members is the decision of the Board, and where a decision is not concurred in by four or more members of the Board,

Exception

- (a) in the case of a review brought under section 16, the decision of the administrator shall be deemed to be confirmed; and
- (b) in the case of an application transmitted under clause 14 (c), the application shall be deemed to be rejected.

31. Any member of the Board may assist an applicant in the preparation or submission of an application to the administrator or before the Board and shall not, by reason thereof, be disqualified from participating in the decision of the Board.

Assistance
to applicant
by Board
member

32.—(1) The Fund may be terminated and closed by the Board after the expiry of three consecutive years from the date of the last award or variation of an award, but in any event not sooner than the 1st day of January, 2001, and with the consent of at least six members of the Board.

Termination
of Fund

(2) The Board shall, before consenting to the Fund being closed, provide to the Minister of Indian and Northern Affairs, Canada, the Attorney General of Ontario and each of the Bands a report in respect of the efficacy of the Fund in achieving the objects of this Act.

Report of
Board

(3) Upon the Board consenting to the Fund being closed,

Duty of
administrator

- (a) the administrator shall, if then possible, purchase from the balance of the Fund for every applicant then in receipt of a benefit a life annuity in the amount of the annual benefit or, if not then possible, do so as soon as it becomes possible, and thereupon advise the Board that the Fund is closed; and
- (b) the administrator shall thereupon pay, to the extent of any balance of the Fund remaining, first to the

Treasurer of Ontario the total of any amounts paid by the Treasurer under subsection 8 (9), and then to each Band one-half of any balance remaining.

Board dissolved

(4) Upon the acceptance by the Attorney General of Ontario of the report provided for in subsection (2) and completion of the payments by the administrator provided for in subsection (3), the Board shall be dissolved.

Indemnification of Treasurer of Ontario

33. The Treasurer of Ontario shall be deemed to be and hereafter continue to be indemnified by each of the Bands, to the extent of any amounts paid to each Band under clause 32 (3) (b) together with interest calculated on such payments at a rate equal to the Consumer Price Index for Canada published by Statistics Canada, against liability for any claim by a person who would have been eligible to be an applicant but for the termination of the Fund brought against any party to the settlement in respect of the matters contemplated by the settlement.

Reciprocal legislation by Canada

34. This Act is enacted in contemplation of a reciprocal enactment by the Parliament of Canada for the purpose of giving effect in part to the settlement, and shall be construed accordingly.

Effect of Act

35. This Act shall have force and effect only to the extent that it is within the legislative jurisdiction of the Legislature.

Benefits not treated as income for purposes of other Acts

36.—(1) Notwithstanding any other Act of the Legislature, the benefits paid or payable to a member of a Band under the terms of the settlement shall not be considered or treated as income for the purposes of any other Act of the Legislature and no payment to which that member is entitled under any other Act of the Legislature shall be reduced by reason of the payment or availability of benefits to that member under the terms of the settlement.

Availability of programs or services not diminished

(2) The moneys paid to the Bands in accordance with the settlement and the benefits paid from the Fund to members of the Bands shall be considered as additional to any applicable program or service offered by the Government of Ontario, and the availability to the Bands and the members thereof of such program or service shall not be diminished by reason of the moneys paid under the settlement or the benefits paid from the Fund.

Insured services under R.S.O. 1980, c. 197

37. Every examination, service, test or report provided by, or at the direction of, an authorized physician in respect of an applicant in accordance with a requirement of the plan

document, the administrator or the Board shall be deemed to be an insured service under the *Health Insurance Act*.

38. For greater certainty, Ontario Supreme Court Action Number 14716/77 (Judicial District of York) shall be deemed to be a representative action, and its disposition in accordance with the settlement shall not be called into question in any court.

Representative action

39. All existing and future rights of action of the Bands and of every past, existing or future member of the Bands, and the estates thereof, in respect of claims and causes of action which are the subject of the settlement are, in consideration of and pursuant to the settlement, abolished.

Existing and future rights of action abolished

40.—(1) The total liability in respect of any claim by a past, present or future member of a Band or a registered Indian customarily resident on a reserve before the 1st day of October, 1985, brought against any party to the settlement in respect of matters contemplated by the settlement, whether brought before or after the Fund is closed, shall be not more than the cost, at the time of the claim, of a life annuity in the amount of the annual maximum benefit payable from the Fund at the time the claim was brought or immediately prior to the Fund being closed, as the case may be.

Limitation on liability in respect of claims

(2) Section 33 and this section shall not be deemed to contemplate that any claim described in section 33, notwithstanding the other provisions of this Act, may be brought or maintained.

Does not contemplate claims may be brought

41. The settlement is entire and the consideration flowing to the Bands and their present and future members therefrom shall be deemed to flow to every such member, and the settlement shall not be deemed to be divided between the Bands and their present and future members by this Act or anything done under the authority of this Act.

Settlement entire

42. The Lieutenant Governor in Council may make regulations prescribing, for the purposes of subsection 4 (5), the procedures to be followed in the collection of the costs of the Board and in the payment of the moneys received to the persons entitled thereto.

Regulations

43. The moneys required to be paid by Ontario in accordance with the terms of the settlement, including the payment of interest thereon where provided for in the settlement at the rate of 8.52 per cent per annum compounded annually from the 15th day of October, 1985, shall be paid out of the Consolidated Revenue Fund.

Moneys

Commence-
ment

44. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

45. The short title of this Act is the *English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986*.